No. 87-1379

In The
Supreme Court of the United States
October Term, 1987

UNITED STATES
DEPARTMENT OF JUSTICE ET AL.,
Petitioners,

vs.

REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The State of California, by its Attorney General John K. Van De Kamp, respectfully submits this brief as amicus curiae pursuant to Supreme Court Rule 36.4.

Amicus voluntarily provides criminal history information to the Federal Bureau of Investigation with the understanding that this information will remain confidential and be used for law enforcement purposes only.

The Attorney General of California is responsible for the security of criminal offender information and is specifically charged with guarding against unauthorized disclosures of information and insuring this information is disseminated only on a need-to-know basis. He is additionally responsible for the coordination of the interstate exchange of criminal offender record information. (Cal. Pen. Code, § 11077.)

Additionally, California case law and article I, section 1 of the California Constitution recognize the right to privacy as an inalienable right of the individual. (See *White v. Davis*, 13 Cal.3d 757, 773-775 (1975).) The California courts have found the official detention and dissemination of criminal history information to be an incursion into the right of privacy but they have tolerated this incursion on the grounds it was justified by a compelling state interest in law enforcement. (*Loder v. Municipal Court*, 17 Cal.3d 859, 864-868 (1976); *Central Valley Chap. 7th Step Foundation v. Younger*, 95 Cal.App.3d 212, 236 (1979).)

FBI disclosure of State criminal history information pursuant to the Freedom of Information Act threatens not only the individual privacy rights of individual Californians but also threatens to undermine the California courts' tolerance of this limited incursion into the individual's sphere of privacy. It further threatens to undermine the national system for the sharing of criminal history information.

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SUMMARY OF ARGUMENT

The FBI acts as a repository and clearing house for criminal offender information voluntarily submitted by the States. Pursuant to Federal law, the FBI disseminates this information on a confidential basis. The laws of many states which compile and submit criminal offender information to the FBI prohibit the public disclosure of the information in these compilations.

The proposition that in passing the Freedom of Information Act (FOIA), Congress impliedly repealed Federal law and disregarded state laws restricting public access to these records is unfounded. Compelling the FBI to disclose this information in response to FOIA requests endangers the present system of sharing Federal and State criminal offender information.

The FOIA exempts federal agencies from disclosing information which would result in "an unwarranted invasion of personal privacy." These exemptions protect the individual's privacy interests in restricting government's collection and dissemination of personal information about private citizens. These privacy rights are recognized by the laws and courts of the states and federal decisional law and should not be confused with the more restrictive privacy rights protected by the constitution and evolving tort law.

The disclosure of criminal offender information in response to "name check" requests is contrary to FBI quality control procedures and contains an inherent risk of misidentification or misinformation which would invade an individual's privacy by placing him in a false light. This risk of injury to individual privacy constitutes an unwarranted invasion of individual privacy within the meaning of the FOIA exemptions.

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ARGUMENT

I

THE FREEDOM OF INFORMATION ACT[1] DOES NOT AUTHORIZE THE FBI TO DISCLOSE CRIMINAL OFFENDER INFORMATION WHICH MANY STATES SUBMIT TO THE FBI WITH THE UNDERSTANDING IT WILL REMAIN CONFIDENTIAL

Pursuant to congressional authorization, the FBI has, since 1924, maintained criminal identification records for the benefit of the national community of criminal justice agencies as well as for the courts and penal institutions. These agencies make inquiries and receive information over a nationwide telecommunications system. (App., pp. 63, 67.)

The FBI is required by statute to exchange information with authorized agencies *with the understanding it will not be disseminated outside the receiving department or related agencies.*[2]

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1. Hereinafter "FOIA."

2. 28 United States Code section 534 provides in part:

"§ 534. Acquisition, preservation, and exchange of identification records; appointment of officials

"(a) The Attorney General shall—

"(1) acquire, collect, classify, and preserve identifcation, criminal identification, crime, and other records; and

"(2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.

(Continued on following page)

States share criminal history information with the FBI on a voluntary mutually beneficial basis. *(Menard v. Saxbe,* 498 F.2d 1017, 1021 (D.C. Cir. 1974); 28 C.F.R. § 0.85.(b).) The laws of many states allow the submission of criminal history information to the FBI only on a confidential basis and with the understanding the information will remain confidential and will be released for law enforcement purposes only.

In California, for example, criminal offender record information is to be disseminated only to agencies who are authorized by statute or law to have access to such records. (Cal. Pen. Code, §§ 11076, 11081.) The Attorney General of California is responsible for the security of criminal offender record information and is specifically charged with guarding against unauthorized disclosures of information, insuring the information is disseminated only on a need-to-know basis, and with coordinating the interstate exchange of criminal offender record information. (Cal. Pen. Code, § 11077.)

It is a crime to disseminate a criminal history record or information from a criminal history record to an unauthorized person. (Cal. Pen. Code, §§ 11141, 11142.) It is also a crime for an unauthorized person to buy, receive or possess a criminal history record or information from a criminal history record. (Cal. Pen. Code, § 11143.)

(Continued from previous page)

"(b) The exchange of records authorized by subsection (a) (2) of this section is *subject to cancellation if dissemination is made outside the receiving departments or related agencies. . . .*" (Emphasis added.)

The assumption that when Congress enacted and amended the FOIA, it repealed, sub silentio and by implication, existing federal law and disregarded existing state laws mandating the confidentiality of criminal offender information is unfounded. A repeal of this magnitude would be such a radical departure from existing practices and policies that one would expect it to be an intensely debated issue in the proceedings to adopt and amend the FOIA.

Amicus is not aware of any references to criminal history information in the legislative history of the FOIA or its amendments.[3] The absence of any mention of this important issue in the legislative history means Congress never intended that the FOIA could be used to compel disclosure of criminal history information.

Congressional repeal of the confidentiality of these records should not be implied because their compelled disclosure pursuant to the FOIA does not foster the objectives of the FOIA. The purpose of the Freedom of Information Act is broad disclosure of government documents in order to insure an informed citizenry vital to an informed democracy. (*F.B.I. v. Abramson*, 456 U.S. 615, 621 (1982).) While Congress undoubtedly sought to expand the public's right of access to government information when it enacted the Freedom of Information Act, the expansion was a finite one. (*Forsham v. Harris*, 445 U.S. 169, 178 (1980).) The subjects of the FBI records in question are not government officials or employees. Public access to citizens' criminal history would not even remotely accomplish the FOIA's objective of informing the citizenry about the workings of the federal government.

3. 94th Cong., 1st Session, FOI and Amendments of 1974, Source Book: Leg. History, Texts and other Documents. 93rd Cong., U.S. Senate, Committee on the Judiciary, Doc. No. 93-82, Freedom of Information Act Source Book: Leg. Materials, Cases, Articles.

Since such expanded access would not further any of the objectives of the FOIA, it is not plausible that Congress ever intended that the FOIA repeal existing federal law (including the Privacy Act), and FBI regulations and authorize the FBI, in violation of existing statute prohibitions, to disclose criminal history information to the public.

II

COMPELLED FBI DISCLOSURE OF STATE RAP SHEETS COULD CURTAIL THE FLOW OF INFORMATION TO THE FBI

By compromising the confidentiality of information compiled for law enforcement purposes, compelled FBI disclosure of criminal offender information could result in restricting the flow of essential information to the government. (See *F.B.I. v. Abramson*, *supra*, 456 U.S. 615, fn. 12 at 628.)

As previously noted, states share criminal history information with the FBI on a voluntary, mutually beneficial basis; the laws of many states forbid the public disclosure of criminal history information. In many states the submission of this information to other law enforcement agencies is only on a confidential basis and with the understanding the information will remain confidential and will only be disseminated for law enforcement purposes. Requiring the FBI to disclose criminal history information which states provide the FBI on a voluntary

basis could compel some states to cease providing the FBI this information and perhaps even to request the FBI to return records previously submitted to the FBI. (See App. p. 64, No. 11.)

III

CRIMINAL OFFENDER INFORMATION IN THE POSSESSION OF THE FBI IS EXEMPT FROM FOIA DISCLOSURE

The Freedom of Information Act exempts from disclosure files, the disclosure of which would constitute a *clearly unwarranted invasion of personal privacy* and records or information compiled for law enforcement purposes to the extent that their production *could reasonably be expected to constitute an unwarranted invasion of personal privacy.* (5 U.S.C. (& Supp. IV) § 552(b)(6) and 7(c); emphasis added.) The disclosure of criminal history information of an individual would constitute an unwarranted invasion of the privacy interests protected by FOIA exemptions 6 and 7(c).

These privacy exemptions of the FOIA protect an individual against the disclosure of information about him for which "he could reasonably assert an option to withhold from the public-at-large because of its intimacy or its possible adverse effects upon himself or his family." (AG's 1974 FOI Amdts. Mem., reprinted in 94th Cong., 1st Session, FOI and Amendments of 1974, Source Book: Leg. History, Texts and Other Documents, at pp. 519-520.) An arrest or a conviction stigmatizes the individual in our society to such an extent that the average individual desires to withhold their existence from the public. (Cf. *Menard v. Saxbe, supra,* 498 F.2d 1017; Cf. App., pp.

89-90.) Even respondents cannot seriously dispute that a criminal history record is the very type of record whose disclosure could adversely affect an individual or his family.[4]

In California the courts have long recognized that personal privacy interests include protecting individuals from the encroachment of computer technology and government data collection activities which make "cradle-to-grave profiles" of citizens possible. (*White v. Davis, supra,* 13 Cal.3d at 775.) Concern with the protection of the privacy rights of individuals includes placing appropriate restraints on the information gathering and disseminating activities of government to prevent information legitimately gathered for one purpose from being misused for other purposes or wrongfully disseminated. (13 Cal.3d at 775.)

California recognizes a privacy interest in "compiled criminal history information." It is the act of creating files on citizens and compiling information about them that impinges on the right of privacy. Controlling the collec-

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4. FBI Special Agent Mercer's description of the repercussions of the disclosure of rap sheet information is noteworthy:

> "Public acknowledgement of the mere existence of such a record could substantially damage the reputation of that individual, hold that individual out to public scrutiny and ridicule resulting in likely embarrassment and personal discomfort, possibly occasion either direct or indirect economic loss with respect to employment, financial opportunities, licensing, education or other such concerns, invite the imposition of social stigma, and *patently constitute a clearly unwarranted invasion of his or her personal privacy.*" (App., pp. 81-82; emphasis added.)

tion and circulation of "personal information" is a fundamental aspect of the right of privacy. (*Id.* at 775.) In California, the State Supreme Court and the Court of Appeal have actually held that the compilation of criminal history information about arrests that do not lead to convictions is an incursion into the right of privacy justified only by the compelling state interests in law enforcement. (*Loder v. Municipal Court, supra*, 17 Cal.3d at 865-868; *Central Valley Chap. 7th Step Foundation v. Younger, supra*, 95 Cal.App.3d at 236.)

The circuit court's failure to consider the distinction between information in public records and compilations of those records threatens the privacy interests of the citizens of California.

The distinction between the original records available at their "primary source" and the criminal record information kept in the repositories in the form of indexed, cumulative records of arrests and convictions is crucial to the resolution of this case. The purposes of these original records of entry and the indexed criminal history records are different. The information found in "police blotters" and court dockets is compiled to record arrests, the filing of criminal charges and court dispositions for the purposes of the agency keeping those records. Criminal history records information, on the other hand, is compiled to give criminal justice agencies and courts as complete as possible a history of an individual's criminal career.

Because the records at issue in this case are those in the indexed form, known customarily as criminal history record information or "rap sheets," the states' treatment of these criminal history records is the more appropriate

focus of a court's inquiry when examining privacy interests. Pursuant to state law, California treats the criminal history record information consolidated in the state's central repository as available only for criminal justice purposes unless otherwise authorized by statute or court order.

The fact that the information sought is contained in public records somewhere in the nation does not mean that the individual's privacy interests in nondisclosure have been extinguished or even attenuated. This Court recognizes that whether the information sought is a matter of public record some place in the nation is not decisive if determining the existence of a privacy issue in a FOIA case. (See *Dept. of State v. Washington Post Co.*, 456 U.S. 595, pp. 602-603 fn. 5 (1982).)

Rather than fading with time, the privacy interests of the average person with a criminal record grow with the passage of time as memories fade and their criminal history loses any newsworthiness it may have ever had. (See *Briscoe v. Reader's Digest Assoc., Inc.*, 4 Cal.3d 529 (1971); Rest. of Torts, § 867, Com. e.); Wm. Prosser and R. Keeton, *The Law of Torts* (5 Ed. 1984), p. 859).

Respondents' reliance on *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975) is misplaced because there the issue was the press' First Amendment right to *publish* information obtained from public records contemporaneous with criminal proceedings. The issue in this case is whether FBI *disclosures* of historical information invade a citizen's privacy rights. Whether or not an individual can bring an action against the press for the publication of this criminal history information or against the FBI for disclosing the information is not the appropriate basis for

determining if FBI disclosure of the information constitutes an unwarranted invasion of privacy.

The privacy exemptions of the FOIA embody a congressional determination to prevent the invasion of an individual's privacy by government *disclosure* (not *publication* by the press) of personal information maintained in government records regardless of whether principles of modern tort and constitutional law allow the individual to maintain an action for invasion of privacy. Indeed, if the individual cannot maintain such an action that is all the more reason for affording him the protection of the privacy exemptions. (See D. O'Brien, *Privacy, Law, and Public Policy*. See also Richard F. Hixon, *Privacy in a Public Society* (New York, Oxford University Press, 1987) at pp. 204, 237.)

The balancing test of the FOIA privacy exemptions is necessary only where there is "substantial uncertainty" whether the invasion of privacy is unwarranted. (AG's 1974 FOIA Amdts. Mem., *supra*, at 320.) Compelled FBI disclosure of criminal offender information clearly invades the individual's privacy right not to have the government disseminate information of criminal activity contained in government compilations.

The type of information involved in this case is so harmful to an individual's privacy interests that there is no uncertainty that such an invasion is "unwarranted." Even if a balancing test were employed, such an invasion of privacy is so contrary to the intent and objectives of the FOIA that there is no conceivable public interest in the disclosure of this information.

IV

FBI DISCLOSURE OF CRIMINAL OFFENDER INFORMATION CONTAINS AN UNWARRANTED RISK OF PLACING A CITIZEN IN A FALSE LIGHT

It is an invasion of a person's privacy to place him in a "false light" by depicting him as a person with a criminal background when in reality he has no such background. (Wm. Prosser and R. Keaton, *The Law of Torts, supra*, p. 864.) Compelling the FBI to respond to a FOIA "name check" request is unwarranted because of the high risk of invading a person's privacy by misidentifying him as someone with a criminal background. Although federal regulations and FBI policies place a great deal of importance on the completeness and accuracy of the criminal history data disseminated by the FBI, studies of criminal history records, even those conducted by the government, have consistently demonstrated a pervasive pattern of data inaccuracy. (Lowenthal, "The Disclosure of Arrest Records to the Public Under the Uniform Criminal History Records Act," Fall 1987, Jurimetrics Journal 9, at p. 14.)

The FBI acknowledges that many of its records are neither accurate nor complete. (App., pp. 65, 90.) Before the FBI disseminates identification records requested for nonfederal employment or licensing purposes, it routinely deletes any entry more than one year old without a disposition. (App. p. 66).

Requests made on the basis of "name checks" carry a high risk of an inaccurate response if the subject has a common name. Even if a date of birth is furnished the FBI will not honor the request if there is a danger of a

mistaken response. (App., pp. 65, 67, 90.) Name check requests from law enforcement agencies are honored because these agencies have the resources to resolve the question of identity. (App., p. 67.)

Requiring the FBI to respond to FOIA requests made without the safeguard of fingerprints violates not only the required confidentiality of the FBI's records, and the laws of many states who submit information to the FBI but also the quality control procedures the FBI has instituted to prevent the injustice of mistakenly branding an innocent citizen as someone with a criminal past.

The risk that an innocent citizen could mistakenly be placed in the false light of a criminal past is so unacceptable that it is an unwarranted invasion of privacy to require the FBI to ignore the risk by violating its own carefully designed procedures.

CONCLUSION

For the foregoing reasons amicus urges this Court to hold that the Freedom of Information Act does not require the FBI to disclose criminal history information because such disclosure constitutes an unwarranted invasion of privacy.

DATED: June 17, 1988

Respectfully submitted,

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